No. 14,585

IN THE

United States Court of Appeals

For the Ninth Circuit

FINTON J. PHELAN, JR., and E. R. CRAIN,
Plaintiffs-Appellants,

vs.

RICHARD TAITANO and HARRY L. MANGERICH,
Defendants-Appellees.

Appeal from the Judgment of the
District Court of Guam.

Civil Case No. 69-54.

BRIEF OF APPELLEES.

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JURISDICTION.

This case was instituted by a complaint filed in the District Court of Guam seeking a money judgment against the appellees—the defendants below—for income taxes collected by the appellees by distraint pursuant to Section 31 of the Organic Act of Guam, Act of August 1, 1950, c. 512, Section 31, 64 Stat. 383, 392, 48 U.S.C., Section 1421i, a declaration that the assessments, levies, warrants of distraint, and notices of tax liens with regard to appellants are void, and a temporary injunction, to be followed by a permanent injunction, against further enforcement of the tax.

The District Court of Guam is the court of general jurisdiction for the unincorporated territory of Guam, Section 22 of the Organic Act of Guam, Act of August 1, 1950, c. 512, Section 22, 64 Stat. 383, 389, 48 U.S.C., Section 1424.

The District Court of Guam dismissed appellants' motion for a temporary injunction and subsequently granted appellees' motion to dismiss the complaint on the grounds that the court had no jurisdiction. Appellants appealed from both orders of the District Court.

Jurisdiction is conferred on this court by 28 U.S.C., Section 1291 and 1294, as amended by the Act of October 31, 1951, c. 655, Sections 48 and 50(a), 65 Stat. 710, 726, 727.

HISTORY.

This is an appeal from the judgment of the District Court of Guam dismissing the complaint of the plaintiffs-appellants.

The complaint was filed against two tax officials of the Government of Guam, as individuals. These officials are the present Director of Finance and Commissioner of Revenue and Taxation.

The complaint seeks to recover a personal judgment against the defendants-appellees for income taxes collected by distraint from the appellants for the years 1951 and 1952. These income taxes were assessed and collected pursuant to Section 31 of the Organic Act of Guam, 48 U.S.C., Section 1421i. In addition the com-

plaint asks that the assessments, levies, warrants of distraint and tax lien notices with respect to appellants be voided, and that a temporary and a permanent injunction be issued against further enforcement of Section 31 on the ground that it does not create a separate territorial income tax enforceable by the appellees.

Appellants' motion for temporary injunction was denied and an immediate appeal was filed.

Subsequently appellees' motion to dismiss the complaint was granted. A second appeal was taken by the appellants.

The two appeals have been combined.

STATEMENT OF THE CASE.

This case is one of a number filed in the District Court of Guam to secure the overruling of *Laguana v. Ansell,* 102 F. Supp. 919, affirmed by this court, 212 F. 2d 207, writ of certiorari denied, 348 U. S. 830, 75 S. Ct. 51, 99 L. Ed. 32.

The *Laguana* case holds that by Section 31 of the Organic Act of Guam, 48 U.S.C., Section 1421i, 64 Stat. 392, the United States Congress enacted a territorial income tax to be enforced by the territorial government.

Two other cases are now on appeal to this court raising this same basic question, whether *Laguana v. Ansell* should be overruled, in both of which the present plaintiffs-appellants are counsel. These are *Wilson v. Kennedy,* No. 14, 593, reported in 123 F. Supp. 156, and *Lamkin v. Brown & Root, Inc.,* No. 14772.

In a fourth case, *Holbrook v. Taitano,* a notice of appeal was filed in the District Court but subsequently dismissed by the appellant. The opinion of the District Court in the *Holbrook* case is reported in 125 F. Supp. 14.

In the present case the appellants have filed suit against two officials of the Government of Guam in their individual capacity. These are Richard Taitano, the Director of Finance, and Harry L. Mangerich, Commissioner of Revenue and Taxation.

Appellants, who appear as counsel pro se, allege in their complaint that they have practiced law in Guam since 1951 (R. 3-4); that Appellee Taitano, defendant below, is charged with the duties of enforcing revenue statutes enacted by the Guam Legislature (R. 4); that Appellee Mangerich, defendant below, is charged by statute with enforcement of the Business Privilege Tax Law, an enactment of the Guam Legislature (R. 4); that appellees have damaged appellants by performing illegal acts under claim of authority not granted by the statutes of the United States or Guam (R. 4).

The complaint further alleges that the appellees purport to be enforcing a "Guam Income Tax Law" based upon the Organic Act of Guam (R. 4) which appellees claim they were delegated to enforce by the Governor of Guam (R. 5), and that the law is based on the United States income tax, including the provisions for assessments, levies, attachments, summons, and criminal enforcement (R. 5-6).

Appellants then allege that appellees "acting unlawfully in the manner set out above"—referring to the enforcement of an alleged Guam income tax—(R. 6) have harassed appellants with summons, made income tax assessments, filed notice of tax liens, issued distraints and levied on their bank accounts (R. 6-7). They allege the assessments are based primarily on gross income (R. 6); however, appellants do not allege their net taxable income.

Appellants allege irreparable harm to themselves in the practice of their profession and the earning of their livelihood by these actions (R. 10-11).

Appellant Phelan further alleges (R. 11-12) that his World War II disability payment checks have been deposited in the bank accounts distrained upon by appellees, and distraint on the proceeds of such checks is in violation of 38 U.S.C.A., and Section 690, Subsection 13, of the Code of Civil Procedure of Guam.

Judgment is demanded (R. 12) in favor of Appellant Phelan in the amount of $311.39 and in favor of Appellant Crain in the amount of $882.94 by reason of the distraint upon appellants' bank accounts. It is asked that the assessments, levies, distraints, and liens against appellants be declared void, and that temporary and permanent injunctions restraining further tax enforcement by appellees be granted. (R. 12).

Appellants do not allege in their complaint that they demanded any refund from the appellees, or anyone else, of the amounts for which judgment is sought. They do not allege they have or have not filed income

tax returns with the United States or the Government of Guam for the years in question. They do admit, however, in their brief (Appellants' Brief, 39) that they have filed no income tax returns with the Government of Guam.

Appellants filed a notice of motion for a preliminary injunction (R. 13), and their own affidavits in support thereof (R. 15, 17), the hearing being set for November 12, 1954.

The District Court denied the motion for preliminary injunction at the hearing (R. 25-28) on the ground that Section 31 of the Organic Act created a separate territorial tax and that appellants were not entitled to injunctive relief against any alleged abuse of discretion or oppression when they have not shown compliance with the law.

Appellants filed notice of appeal on November 12, 1954 (R. 23).

Appellees had filed a motion to dismiss and for summary judgment on November 12, 1954 (R. 19), which subsequently came up for hearing on November 26, 1954 (R. 28-32).[1]

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[1]It is stated in appellants' brief at page 42:

"No notice of motion pertaining to this motion to dismiss was ever filed or served upon appellants."

However, the record shows that such a Notice of Motion was filed (Supplemental Record, 45-46), together with an affidavit of service on both appellants covering the Notice of Motion, motion and affidavit of appellee Mangerich (Supplemental Record, 46). Appellants' Designation of Contents of Record on Appeal (Supplemental Record, 47-48), filed November 18, 1954, also lists under Item 3: "Defendant-Appellees' Motion, Notice of Motion and supporting affidavits."

At the hearing on November 26, 1954 the appellants objected that since they had filed an appeal from the ruling of the District Court of November 12, 1954, denying their motion for a preliminary injunction, that the entire case was now before the Court of Appeals. The court ruled in effect that the appeal was only with regard to the denial of the preliminary injunction and thereupon proceeded to hear the motion of the appellees.

Referring again to the decision in the *Laguana* case, the court ruled that if the appellants were discriminated against, they would be entitled to the intervention of the court provided they had done all they could to protect themselves, but that in the present instance the complaint does not show that the appellants have filed any tax returns or paid the tax (R. 30). The court continued:

> " . . . The court will make the same ruling in this case as it did in the Holbrook case.[2] With the absence of any showing that the plaintiff has complied with the local income tax law by filing returns and paying the tax, the court is without jurisdiction and the case is dismissed . . . You should prepare an order dismissing the action for the reason that the court has no jurisdiction under the allegations of the complaint" (R. 31).

The order of dismissal was entered on November 30, 1954 (R. 34). A notice of appeal was filed December 6, 1954 (R. 35).

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[2]*Holbrook v. Taitano,* supra (DC Guam, 1954) 125 F. Supp. 14.

QUESTIONS PRESENTED.

The questions presented are:

1. The basic fundamental question is whether the decision in the *Laguana v. Ansell,* holding that Section 31 of the Organic Act of Guam imposes a separate territorial income tax to be collected by the proper officials of the Government of Guam, should be overruled.

2. Whether the District Court erred in following *Laguana v. Ansell* in holding that Section 31 of the Organic Act of Guam imposes a separate territorial income tax to be paid to the proper officials of the Government of Guam.

3. Whether the appellees are properly authorized to enforce the separate territorial income tax created by Section 31 of the Organic Act of Guam.

4. Whether there is any constitutional issue warranting the overruling of *Laguana v. Ansell.*

5. Whether the District Court erred in ruling that it did not have jurisdiction over the subject matter of the action.

6. Whether by virtue of Section 7422 of the Internal Revenue Code of 1954 the complaint states a cause of action for refund of taxes collected.

7. Whether the District Court retained jurisdiction of the case following appellants' appeal from the denial of their motion for temporary injunction.

8. Whether appellant Phelan's separate cause of action, based on the alleged immunity of the proceeds of his disability payments, was properly dismissed by the District Court.

9. Whether the District Court erred in permitting members of the Attorney General's staff to represent appellees.

STATUTES AND RULES INVOLVED.

Organic Act of Guam, C. 512, 64 Stat. 384:

> "Section 6(b). The Governor shall have general supervision and control of all executive agencies and instrumentalities of the government of Guam. He shall faithfully execute the laws of the United States applicable to Guam, and the laws of Guam. He may grant pardons and reprieves and remit fines and forfeitures for offenses against the local laws, and may grant respites for all offenses against the applicable laws of the United States until the decision of the President can be ascertained. He may veto any legislation as provided in this Act. He shall commission all officers that he may be authorized to appoint. He may call upon the commanders of the armed forces of the United States in Guam, or summon the posse comitatus, or call out the militia, to prevent or supress violence, in surrection, or rebellion; and he may, in case of rebellion, invasion or iminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place Guam, or any part thereof, under martial law, until communication can be had with the President and the President's decision thereon communicated to the Governor. He shall annually, and at such other times as the President of the Congress may require, make official report of the transactions of the govern-

ment of Guam to the head of the department or agency designated by the President under section 3 of this Act, and his said annual report shall be transmitted by such department or agency to the Congress. He shall perform such additional duties and functions as may, in pursuance of law, be delegated to him by the President, or by the department or agency. He shall have the power to issue executive regulations not in conflict with any applicable law. The Governor may submit such recommendations for the enactment of legislation to the legisture as he shall consider to be in the people's interest." (48 U.S.C. 1952 Ed., Sec 1422(b))

"Section 9(b). The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law." (48 U.S.C. 1952 Ed., Sec 1422c(b))

"Section 30. All customs duties and Federal income taxes derived from Guam, the proceeds of all taxes collected under the internal-revenue laws of the United States on articles produced in Guam and transported to the United States, its Territories, or possessions, or consumed in Guam, and the proceeds of any other taxes which may be levied by the Congress on the inhabitants of Guam, and all quarantine, passport, immigration, and naturalization fees collected in Guam shall be covered into the treasury of Guam and held in account for the government of Guam, and shall be expended for the benefit and government of Guam in accordance with the annual budgets." (48 U.S.C. 1952 Ed., Sec 1421h)

"Section 31. The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam." (48 U.S.C. 1952 Ed., Sec 1421i)

United States Internal Revenue Code of 1954:

"Section 6334. Property Exempt from Levy.

(a) Enumeration. There shall be exempt from levy:

(1) Wearing Apparel and School Books. Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, Provisions, Furniture, and Personal Effects. If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value;

(3) Books and Tools of a Trade, Business, or Profession. So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value.

(b) Appraisal. The officer seizing property of the type described in subsection (a) shall appraise and set aside to the owner the amount of such property declared to be exempt. If the taxpayer objects at the time of the seizure to the valuation fixed by the officer making the seizure, the Secretary or his delegate shall summon three disinterested individuals who shall make the valuation.

(c) No Other Property Exempt. Notwithstanding any other law of the United States, no prop-

erty or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

"Section 7421.

(a) Tax. Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

"Section 7422.

(a) No Suit Prior to Filing Claim for Refund. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

Government Code of Guam:

"Section 7. Authority of deputies and agents. Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise.

"Section 5101. Department of Law. There is within the Executive Branch of the government of Guam a Department of Law. The Attorney General is the head of the Department of Law. The

Attorney General is appointed by the Governor with the consent of the Legislature.

"Section 7000. Attorney General. The Department of Law of the government of Guam shall be administered by the Attorney General of Guam, who shall be appointed by the Governor of Guam, with the advice and consent of the Legislature, and shall be subject to removal by the Governor.

"Section 7001. Department of Law, cognizance. The Department of Law shall have cognizance of all legal matters in which the government of Guam is in anywise interested. It shall have cognizance of all matters pertaining to public prosecution. For this purpose the Island Attorney, deputy Island Attorneys and all employees of the Island Attorney's office shall form the prosecution division of the Department of Law and are placed under the jurisdiction of the Attorney General.

"Section 7101. Duties. The Island Attorney is the public prosecutor and, by himself or a deputy, shall:

(1) Conduct on behalf of the government of Guam the prosecution of all offenses against the laws of Guam which are prosecuted in the District Court or the Island Court and, when directed by the Attorney General, the prosecution of those offenses which are prosecuted in the Police Court;

(2) Institute proceedings for the arrest of persons charged with or reasonably suspected of offenses under the laws of Guam, when he has information that any such offenses have been committed; and for that purpose, when not engaged in criminal proceedings in the courts, or in civil cases on behalf of the government of Guam, may attend preliminary investigations before the Di-

rector of Public Safety or before any magistrate in cases of arrest;

(3) Draw all informations, conduct on behalf of the government of Guam all civil actions in which the government is a party or interested, prosecute all recognizances forfeited in the courts and all actions for the recovery of debts, fines, penalties, and forfeitures accruing to the government of Guam;

(4) Deliver receipts for money or property received by him in his official capacity and file duplicates thereof with the Director of Finance;

(5) As soon as practical after the receipt of any money in his official capacity, turn the money over to the Director of Finance, and on the first Monday of each month file with the Director of Finance, an account, verified by his oath, of all moneys received by him in his official capacity for the Government of Guam during the preceding month;

(6) Be diligent in protecting the rights and properties of the government of Guam; and

(7) Perform such other duties as are required by law or assigned to him by the Attorney General."

Rules of the United States Court of Appeals for the Ninth Circuit:

"Rule 35. Cases Involving Constitutional Question where United States is not a Party. Notice to Court and to Attorney General. It shall be the duty of counsel who challenges the constitutionality of any Act of Congress affecting the public interest in any suit or proceeding in this court to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is

not a party, upon the filing of the record to give immediate notice in writing to this court of the existence of said question, specifying the section of the statute to be construed. In all such cases the clerk of this court shall certify such fact to the Attorney General. (See 28 U.S.C. Sec. 2403.)"

SUMMARY OF ARGUMENT.

Section 31 of the Organic Act of Guam has been interpreted in *Laguana v. Ansell,* supra, to establish a separate territorial income tax, consisting of the United States income tax laws, which are to be enforced by the officials of Guam.

The *Laguana* decision involved a suit brought for a refund of withholding taxes collected by the employer of the plaintiff and paid over the the Government of Guam. Insofar as the present appellants are seeking a refund of the taxes collected from them by distraint, the *Laguana* decision is not only a precedent on basic principles but practically on all fours.

Appellants' interpretation of Section 31 that it is merely declarative of existing law, that the United States income tax laws apply in Guam, would disregard the intent of Congress to provide that persons on Guam would pay an income tax to support the Government of Guam. Appellants' interpretation would leave in effect the exempting provisions under the United States income tax laws so that for practical purposes there would be no increase of revenue whatsoever accruing to the United States or the Government of Guam.

Section 31 is legislation by the Congress of the United States acting in its capacity as the supreme legislative authority over territories and possessions. In other words, it is a local law of Guam but enacted by the Congress of the United States instead of by the Guam Legislature.

Although appellants argue a number of constitutional points, such as violations of the Fourth and Fifth Amendments, these objections are based principally on the contention that there is no separate territorial tax and consequently appellees' acts have been without authority.

No facts showing "vagueness" and "indefiniteness" have been alleged.

The argument as to delegation of legislative authority is without foundation, since in any event Congress can give legislative authority to the executive branch of a territorial government.

The authority of the appellees to enforce the separate territorial income tax stems from the fact that under the Organic Act Section 6(b), the Governor of Guam has the obligation of enforcing the laws of the United States applicable to Guam and the laws of Guam.

This authority, with regard to the income tax, is exercised through the Director of Finance, the Appellee Taitano, and the Commissioner of Revenue and Taxation, the Appellee Mangerich.

The term "income tax laws" as used in Section 31 of necessity not only includes such provisions as pertain

to rates of tax, exemptions, deductions, and other matters pertaining to the computation of the tax, but also such other provisions of the Internal Revenue Code of the United States that pertain to the enforcement of the tax.

Consequently those provisions which pertain to he assessment and distraint are available to the tax officials of the Government of Guam.

Further, Section 7421(a), which bars any judicial proceedings to restrain the assessment or collection of the tax, necessarily applies with regard to the Guam tax. Consequently the District Court correctly ruled that it had no jurisdiction over the complaint.

In addition appellants' refusal to comply with the income tax laws bars them from asking any equitable relief on the ground of any exceptional circumstances, even if such circumstances did exist.

Similarly, since appellants filed no claim for a refund of the tax collected from them, under the provisions of Section 7422(a) of the Internal Revenue Code, the District Court had no jurisdiction insofar as the complaint asked for judgment for the refund of taxes collected.

Although appellants had filed an appeal from the denial of their motion for a temporary injunction against the enforcement of the income tax, the District Court still retained the case and it was proper for the court thereafter to entertain the motion of the appellees to dismiss the case for lack of jurisdiction.

Appellant Phelan's separate cause of action, based upon his claim that his bank accounts could not be

levied upon because he had deposited therein his disability payment checks received from the United States Veterans Administration, was also properly dismissed. Appellant Phelan had failed to identify any specific sum as being within the claimed exemption, but in any event the exemption provisions of Section 6334 of the Internal Revenue Code apply, overriding any other statutory exemptions that may exist. However, in any event, appellant Phelan has failed to allege compliance with Section 7422(a) by filing a proper claim for refund.

Appellants' objection to the appearance of members of the Attorney General's staff as counsel for the appellees is without merit and does not constitute reversible error. Although the appellees have been sued in their individual capacities, the complaint is actually based upon acts performed by them in enforcement of the separate territorial income tax. The Government of Guam certainly has a vital interest in sustaining the validity of this tax, and the acts of its officials in the enforcement thereof. Accordingly, it was proper for the Attorney General and his staff to represent the appellees.

ARGUMENT.

I.

THE FUNDAMENTAL QUESTION ON THIS APPEAL, WHETHER SECTION 31 OF THE ORGANIC ACT OF GUAM CREATES A SEPARATE TERRITORIAL INCOME TAX TO BE ENFORCED BY THE PROPER OFFICIALS OF THE GOVERNMENT OF GUAM, HAS ALREADY BEEN DECIDED BY THIS COURT IN LAGUANA v. ANSELL IN FAVOR OF THE APPELLEES.

Section 31 of the Organic Act states:

> "The income tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam."

The contention of the appellants is that Section 31 of the Organic Act does not create a separate territorial income tax for Guam and that the appellees, having no authority to collect any such income tax, either by United States or Guam statute, have accordingly acted illegally toward the appellants in enforcing the tax against them.

The basic issue, however, whether Section 31 creates a separate territorial income tax to be collected by the proper officials of the Government of Guam has already been ruled upon in *Laguana v. Ansell,* supra, (DC Guam, 1952) 102 F. Supp. 919, affirmed by this court, 212 F. 2d 207, writ of certiorari denied, 348 U.S. 830, 75 S.Ct. 51, 99 L. Ed. 32. It may be noted that the United States intervened as a party defendant in support of the separate tax construction.

In the *Laguana* case plaintiff Laguana sued the defendant Ansell, the then Acting Tax Commissioner and

Acting Treasurer of the Government of Guam, for a refund of the tax withheld from his wages by his employer and paid into the Treasury of Guam. Insofar as the present appellants are seeking a refund of taxes collected from them by levy on their bank accounts, the factual situation in the present case is similar to that in the *Laguana* case.

The opinion of the District Court in the *Laguana* case, 102 F. Supp. 919, states at page 920:

> "The position taken by the taxpayer is that Sec. 31 made applicable to Guam the Federal income-tax laws as such, including any provisions granting exemptions from taxation on income derived from sources within possessions of the United States, 26 U.S.C.A., Sections 251 and 252.
>
> "The position taken by the governments is that the effect of Sec. 31 is to set up a separate income-tax system for Guam which is a duplicate of the Federal income-tax system; that the United States Congress in exercising its authority to legislate for the unincorporated territories and possessions has established a separate and distinct taxing jurisdiction which contemplates collection of the tax by territorial officials for the use and benefit of the inhabitants of the territory; that in the alternative the taxpayer cannot be heard to complain in the instant case as the tax was owing and reached the eventual source for which it was intended.
>
> * * *
>
> "It seems to me that it is little more than vagrant intellectual exercise to assume that in these days of great challenge the United States Congress intended by Sec. 31 to do less than impose the full burden of income taxation, measured by the Fed-

eral tax, in this unincorporated territory. Even the very limited discussion indicates that the Congress was fully aware of the fact that it was taxing those who may have previously come within one or more of the exemptions in 26 U.S.C.A., Sections 251 and 252.

"The United States Treasury Department has construed Sec. 31 as establishing a territorial tax to be administered by the officials of the Guam government and the United States supports that holding, 1951-6-13559, I.T. 4046. The taxpayer has therefore complied with the instructions of both governments in meeting his tax liability and his tax has covered into the treasury of Guam. He cannot now be heard to say that the tax should be returned to him in order that it be paid to the United States and returned to the Guam treasury from which it was taken. The case of Stone v. White, 301 U.S. 532, 57 S. Ct. 851, 81 L. Ed. 1265, disposes of any such contention.

"The question remains as to whether Sec. 31 imposes a Federal tax to be collected by the United States or a territorial tax to be collected by the Government of Guam.

* * *

"As the governments point out, however, in those instances when Congress has made the income-tax laws in force in the United States applicable to possessions it has in the two major instances of the Philippines and Puerto Rico directed that such tax was to be collected by the territorial governments; and the courts have held that the effect of such legislation was to levy a territorial tax. Lawrence v. Wardell, 9 Cir., 273 F. 406; Robinette v. Commissioner of Internal Revenue, 6 Cir., 139 F. 2d 285.

Later both the Philippines and Puerto Rico were given authority to adopt their own income-tax laws.

"The Naval Appropriations Act of 1921, 42 Stat. 122, 123, contained the following proviso: 'That the income tax laws now in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, *except that the proceeds of such taxes shall be paid into the treasuries of said islands.*' (Italics supplied.)

"It does not appear that this proviso has been the subject of reported litigation but the United States Treasury construed it in its opinion I.T. 2946 (C.B. X14-2, 109 (1935)) as establishing separate and distinct taxing jurisdictions although their income-tax laws arose from an identical statute applicable to each. In its opinion I.T. 4046, 1951-6-13559 is similarly construed Sec. 31, supra, as establishing a separate territorial tax in Guam and that Section 251(a) of the Internal Revenue Code is applicable insofar as taxes due the United States are involved.

"Regardless of my initial view that Sec. 31 imposed a Federal tax to be collected by the United States, I believe that I shall add to any existing confusion by persisting in that view in the light of the position taken by the governments involved and my conviction that in any event a tax is imposed. I hold that the effect of Sec. 31 is to impose a territorial tax to be collected by the proper officials of the Government of Guam."

This Court affirmed the decision of the District Court, 212 F. 2d 207, by stating:

> "For the reasons given in the court's opinion filed February 29, 1952, 102 F. Supp. 919, the judgment is affirmed."

The appellants in the present appeal do not expressly ask that the *Laguana* case be overruled and not followed in the present appeal. In fact the *Laguana* decision is entirely ignored in their brief. As far as their legal arguments are concerned, appellants are proceeding as if this were a case of first instance and the *Laguana* case was never filed. They label the separate territorial tax as "legislation by the District Court of Guam acting in conjunction with the executive department of the Government of Guam" (Appellants' Brief, 50-51).

The contention of the appellants as to the correct interpretation of Section 31 of the Organic Act of Guam is set forth in their brief as follows:

> "Appellants contend that the proper construction of this statute is that this section reaffirms and continues the application to Guam of Title 26 U.S.C.A., which Title for many years has applied to Guam and which is continued in effect, subject to such future alterations as the Congress may from time to time make in its text." (Appellants' Brief, 59.)

Appellants fail to mention that their interpretation of Section 31 would make Section 31 a legislative nonentity in that it effected no change in existing law.

The fact is, of course, that although the United States income tax long applied to income earned in Guam, an exemption was also provided by Section 251 of the

United States Internal Revenue Code of 1939,[3] under which the vast majority of taxpayers, namely those who earned more than 80 percent of their income in a possession of the United States, were permitted to avoid the United States tax.

Appellants inferentially, though not expressly, claim that this exemption still exists despite Section 31. Thus they say:

> "Appellants have denied and continue to deny that they owe to the appellees *or to anyone else,* including the Government of Guam, the *sums of money or any part of said sums* which these appellees have asserted their right to levy and receive." (Emphasis added; Appellants' Brief, 57.)

The express purpose of Section 31, however, as shown in its legislative history recited in the *Laguana* opinion, 102 F. Supp. at pages 920-921, was to tax this income earned in Guam which previously escaped taxation under the United States income tax laws by virtue of the exemption. At the same time it was the intent to grant this additional revenue to the Government of Guam for its support. Yet appellants are in effect asserting that this purpose of Congress was not accomplished and instead Section 31 merely amounts to a gratuitous declaration of what has long been existing law.

Appellants' brief claims that the District Court "erred gravely in distinguishing between Statutes of the United States, Statutes of Guam and such Statutes, if any exist, as may be Statutes enacted by the Congress

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[3]Section 931 of the United States Internal Revenue Code of 1954.

as local Statutes of Guam." (Appellants' Brief 31, 48-50) It is claimed by the appellants that this is a basic error, resulting in much confusion.

Contrary to what the appellants claim, it is apparent that Section 31 of the Organic Act is an example of legislation enacted by the Congress of the United States as the local law of a territory or possession.

Certainly in the broad sense Section 31 of the Organic Act, and the entire Organic Act for that matter, is a United States statute, an Act of Congress, and even a Federal statute. Section 31 may even be said to impose a "federal tax" in the broad sense of the term.

However, basically, in enacting the Organic Act, Congress established the basic law of Guam, similar in some respects to a state constitution. In enacting Section 31 specifically, moreover, Congress enacted by reference as a local law of Guam the income tax laws of the United States then in force or thereafter enacted.

The nature of the Organic Act of any territory and the relation of Congress to territories is no better set forth than in *First National Bank of Brunswick v. County of Yankton,* (1880) 101 U.S. 789, 25 L. Ed. 1046:

> "All territory within the jurisdiction of the United States not included in any State must, necessarily be governed by or under the authority of Congress. The territories are but political subdivisions of the outlying dominion of the United States. They bear much the same relation to the General Government that counties do to the States, and Congress may legislate for them as States do for their respective municipal organizations. The or-

ganic law of a Territory takes the place of a constitution, as the *fundamental law of the local government.* It is obligatory on and binds the territorial authorities; but Congress is supreme and, for the purposes of this department of its governmental authority, has all the powers of the People of the United States, except such as have been expressly or by implication, reserved in the prohibitions of the Constitution.

"In the Organic Act of Dakota there was no express reservation of power in Congress to amend the Acts of the territorial Legislature, but none was necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only subrogate laws of the territorial Legislatures, *but it may itself legislate directly for the local government.* It may make a void Act of the territorial legislature valid, and a valid Act void. In other words, it has full and complete legislative authority over the People of the Territories and all the departments of the territorial governments. It may do for the territories what the People, under the Constitution of the United States may do for the States." (Emphasis added.)

The local nature of of laws enacted by Congress for territories is further brought out in *United States v. Pridgeon,* (1894) 153 U.S. 48, 14 S. Ct. 746, 38 L. Ed. 631, in which the Supreme Court held that the Territory of Oklahoma and not the United States must prosecute for violation of a territorial law enacted by Congress:

"But it is suggested on behalf of the United States that the provisional and temporary adoption by Congress of the Nebraska Criminal Code for the territory of Oklahoma had the effect of making lar-

ceny or horse stealing an offense against the United State, punishable on the federal side of the courts of the territory. The supreme court of the territory has held that the Criminal Code of Nebraska, established by Congress, was to be treated as if it has been enacted by the territorial legislature, and was to be dealt with as if the crimes thereby declared were crimes, not against the United States, but against the territory. Thus, in Ex parte Larkin, 1 Okl. 53, 57, 25 Pac. 745, Green, C.J., says: 'It was intended by Congress that the laws of Nebraska should constitute a territorial code, as distinguished from the laws of the United States in force in the territory of Oklahoma, and that they should sustain the same relation to the courts and to the people of the territory, and to the legislative assembly, as a code of laws enacted by the legislative assembly.'

"If, as suggested by counsel for the government, section 11 of the Act of May 2, 1890, could be treated as establishing the provisional Criminal Code, therein mentioned, as a law of the United States and as creating offenses against the federal government, pending the first session and adjournment of the Oklahoma legislature, so as to make horse stealing during that time a crime not against the territorial government but against the United States, the proceeding on the federal side of the court was entirely lawful, the sentence of five years, as well as the imposition of 'hard labor' being authorized by the Nebraska Criminal Code as above quoted.

"It was certainly competent for Congress to have adopted the Criminal Code of Nebraska, so as to make horse stealing a crime against the United States in the Oklahoma Territory, just as by sec-

tion 5391, Rev. St., it has adopted the Penal Code of the states in respect to offenses committeed in forts, dock yards, navy yards, and other places ceded to the United States, where the offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States.

"But we are of the opinion that the supreme court of the territory, in Ex parte Larkin, has taken the proper view of the effect of section 11 of the Act of May 2, 1890, in holding that the *laws of Nebraska were adopted as a territorial code;* and, this being so, a court of the United States did not have jurisdiction of the offense of horse stealing within the territorial limits of Oklahoma under the Act of May 2, 1890, or by virtue of the Nebraska Criminal Code, provisionally adopted for the territory." (Emphasis added)

Like Section 31 of the Organic Act of Guam, it is noted that the Pridgeon case also furnishes another example where Congress enacted a local law for a territory by incorporating by reference the law of another jurisdiction.

The Organic Act of Alaska, 23 Stat. 25, is a further example of such legislation:

"That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States; . . . "

In later enacting a criminal code for Alaska, it has been held Congress enacted a local law, as indicated in *United States v. Sloan,* (DC Mont. 1945) 61 F. Supp. 439, 440:

> "It does not seem to this Court that the offense charged in the indictment as perjury in an application for a marriage license, made to a United States Commissioner in Alaska, is any more an offense against the laws of the United States than was the offense of kidnapping in the Krause case. It would appear that the intent of Congress was to treat the Criminal Code of Alaska as a territorial act as distinguished from the laws of the United States. United States v. Pridgeon, 153 U.S. 48, 14 S.Ct. 746, 38 L.Ed. 631; Jackson v. United States, 9 Cir., 102 F. 473."

So also in Hawaii, between the time of the annexation of those islands and their organization as the Territory of Hawaii, the prior laws of the Republic of Hawaii, with certain exceptions, were kept in force as local laws by enactment of a general reference statute by Congress, 31 Stat. 142. The codification of this provision, which is still in effect, is in 48 U.S.C., Section 496. The numerous cases cited in 48 U.S.C.A. indicate the validity of such legislation.

It is submitted that Section 31 of the Organic Act of Guam creates for Guam a separate territorial income tax enforceable by officials of the Government of Guam, by incorporation by reference, and the *Laguana* case, supra, in so holding, governs the present appeal.

II.

APPELLANTS' CONTENTION THAT APPELLEES ARE NOT AUTHORIZED TO ENFORCE THE TERRITORIAL INCOME TAX IS UNWARRANTED.

Appellants question the authority of the appellees to enforce the tax imposed by Section 31 of the Organic Act (Item 3 of complaint, R. 4; Appellants' Brief, 6, 47, 50). They suggest that the only authority of the appellees to enforce taxes is with regard to taxes enacted by the Legislature of Guam under Title XX, Government Code of Guam (Item 5 of complaint, R. 6; Appellants' Brief, 47). They say the appellees are being sued as individuals and "cannot claim the protection of their titles" (Appellants' Brief, 47, 48).

A reading of the complaint and appellants' brief, however, indicates that appellants' contention as to lack of enforcement authority is based primarily on the erroneous theory that Section 31 of the Organic Act does not create a separate territorial income tax.

Once the correctness of the decision in the *Laguana* case is demonstrated, as shown in Part I of this brief, the issue as to lack of authority to enforce the separate tax necessarily fails.

The authority to enforce the separate territorial income tax created by Section 31 is also contained in the Organic Act, Section 6(b), 48 U.S.C., Section 1422(b), which provides:

> "The Governor shall have general supervision and control of all executive agencies and instrumentalities of the Government of Guam. He shall faithfully execute the laws of the United States applicable to Guam, and the laws of Guam . . . "

As pointed out in Part I hereof, Section 31 of the Organic Act, an Act of Congress, is a "law of the United States applicable to Guam."

Further, in creating a separate territorial income tax, Congress by Section 31 has enacted a local law for Guam under its power to legislate directly for territories and possessions. In this sense the territorial income tax is a "law of Guam":

First National Bank v. Yankton, supra, (1880) 101 U.S. 789, 25 L. Ed. 1046;

United States v. Pridgeon, supra, (1894) 153 U.S. 48, 14 S.Ct. 746, 38 L. Ed. 631;

Ex parte Krause, (DC ND Wash., 1915) 228 F. 547;

United States v. Sloan, supra, (DC Mont., 1945) 61 F. Supp. 439;

United States v. Wright, (DC Hawaii, 1954) 15 F.R.D. 184.

In carrying out his duties to enforce the law, the Governor can unquestionably delegate to other officials and subordinates of the executive branch of the government. This authority is recognized in the Organic Act, Section 9(b), 48 U.S.C., Section 1422c(b):

> "The Governor may appoint or remove any officer whose appointment or removal is not otherwise provided for. All officers shall have such powers and duties as may be conferred or imposed on them by law or by executive regulation of the Governor not inconsistent with any law."

Since the inception of the territorial income tax under Section 31 of the Organic Act, its enforcement has been

delegated to the Director of Finance. Within the Department of Finance enforcement of the income tax has been the primary function and duty of the Commissioner of Revenue and Taxation. Affidavit of Appellee Taitano (R. 22-23).

Appellants argue further, however, that:

> " . . . if it (the alleged territorial income tax) is a local Statute, no such officers exist within the Government of Guam and these defendants are acting without any color of law and in want of any authority." Appellants' Brief, 6)

Of course, the tax is not a "local statute," i.e., one enacted by the Guam Legislature. But, as previously pointed out, it is a local law of Guam, enacted by the Congress of the United States for Guam.

No local legislation by the Guam Legislature was or is required to authorize appellees, as tax officials, to enforce the territorial income tax. The delegation from the Governor is sufficient.

As stated in the *Laguana* opinion, 102 F. Supp. 919 at page 921: "When the Congress imposes a tax of this nature it intends that it shall be collected." Accordingly, the tax as enacted must have been intended by Congress to be complete in itself, ready to be enforced by the executive authorities of Guam. It cannot be presumed Congress intended to create a vacuum—impose a tax but say no one is authorized to collect it. Consequently, no action by the Guam Legislature was necessary to put the tax into effect. Nor could any action by the Guam Legislature repeal the tax so imposed, preclude its enforcement, or limit its effect.

If Congress desired to withhold the enforcement of Section 31 as a separate territorial income tax until implementing legislation by the Guam Legislature was enacted[4], it could have done so. In the absence of any express limitation in the statute, no such condition can be assumed. Otherwise the Guam Legislature would have a veto over the power of Congress. The express intent of Congress with regard to Section 31 could thereby be frustrated.

In *Wilson v. Kennedy,* (DC Guam, 1954) 123 F. Supp. 156, appeal presently pending in this court, No. 14593, and *Holbrook v. Taitano,* (DC Guam, 1954) 125 F. Supp. 14, the District Court has recognized the authority of the tax officials of the Government of Guam to enforce the separate tax.

Appellants' reference (Appellants' Brief, 47) to tax statutes enacted by the Guam Legislature and contained in Title XX, Government Code of Guam, is entirely irrelevant. Whatever duties appellees have under Title XX would not prevent the Governor from delegating to them additional duties with refence to the Congress-imposed territorial income tax.

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[4]An example of where Congress enacted a tax statute for a possession and specifically gave the local government authority to implement it is contained in *Ricardo v. Ambrose,* (CA 3, 1954) 211 F. 2d 212, involving a real estate tax for the Virgin Islands, 49 Stat. 1372, 48 U.S.C.A., Sections 1401-1401e. It is also interesting to note that the Virgin Islands, which has had the same type of income tax law as Guam, Act of July 12, 1921, c. 44, Sec. 1, 42 Stat. 123, 48 U.S.C. 1952 Ed. Sec. 1397, has apparently never implemented this income tax provision by local legislation. Letter, Governor of Virgin Islands to Director, Office of Territories, Department of the Interior, November 16, 1954; letter, United States Attorney, Virgin Islands, to Acting Attorney General, June 3, 1954. (Reproduced in Appendix, infra.)

There is no question, of course, but that the complaint is directed at the appellees as individuals, but it is for acts done by them in carrying out the duties of offices held by them under the Government of Guam connected with enforcement of the territorial income tax. Appellants talk about appellees shielding themselves behind the "cloak of their official duties" and claiming the "protection of their titles," but that is merely begging the question of whether Section 31 creates a separate tax to be enforced by appellees as the tax officials of the Government of Guam.

III.

IT IS SUBMITTED THAT APPELLANTS' ARGUMENTS AS TO CONSTITUTIONALITY DO NOT WARRANT THE OVERRULING OF LAGUANA v. ANSELL AND REVERSAL OF THE PRESENT CASE.

Appellants' complaint and brief set forth a number of constitutional points (Items 7, 8, 9, and 10 of the complaint, R. 7-9; Appellants' Brief, 32-33, 35, 38, 54-60).

A. The Laguana Decision Answers Many of Appellants' Points.

Appellants' arguments as to constitutionality are not always clearly defined, nor their application clearly indicated.

Insofar as the *Laguana* decision has ruled that Section 31 establishes a separate territorial income tax to be enforced by officials of the Government of Guam, many aspects of these constitutional arguments are disposed of.

To the extent, therefore, that appellants base their constitutional arguments on the erroneous theory that Section 31 does not create a separate territorial tax, that the Government of Guam has no authority to enforce any such separate tax, that the appellees have no authority as officials of the Government of Guam to enforce any such tax but are mere usurpers and interlopers, or that the amount of the tax obligation of these appellants cannot be construed with certainty, their arguments fail. On these grounds they cannot complain that there has been a violation of the Fourth and Fifth Amendments, a taking of property without due process of law, a denial of equal protection of the laws, or violation of civil rights.

As to whether there has been any improper enforcement of the separate territorial income tax or any lack of adequate review procedures, resulting in any deprivation of appellants' constitutional rights, these matters are considered in Part IV, infra, in discussing the possibility of there being exceptional circumstances taking appellants' case outside the prohibition against injunctions under Section 7421(a), Internal Revenue Code of 1954, 26 U.S.C., Section 7421(a).

B. As to Delegation of Legislative Powers.

Appellants contend that the construction of Section 31 of the Organic Act as creating a separate territorial income tax is an unlawful delegation or usurpation of legislative powers and authority (Complaint, Items 7a, 7b, 9, R. 7, 8; Appellants' Brief, 33, 35).

The claim of an unlawful delegation of authority by the United States Commissioner of Internal Revenue,

as made in Item 9 of the complaint (R.8), is groundless. As previously pointed out in Part II hereof, the authority of the appellees to enforce the separate territorial income tax comes from the Governor and his authority and obligation under the Organic Act to enforce the laws of the United States applicable to Guam and the laws of Guam.

The question of delegation of legislative powers is a further challenge to the correctness of the *Laguana* decision in holding that Section 31 creates a separate tax. In applying the income-tax laws of the United States as a separate territorial Guam tax, it is at times necessary to make non-substantive changes, as for example, reading "Guam" for "United States." This necessity was pointed out and approved in *Wilson v. Kennedy,* supra, 123 F. Supp. at page 159, where the court cited a similar practice in the Virgin Islands.

It is submitted that no delegation of legislative powers is involved here. The tax officials of the Government of Guam, in enforcing the separate territorial income tax, consisting as it does of the United States income-tax laws, must of necessity read the law with substituted terminology appropriate to its function as a local tax if it is to have any meaning and if the intent of Congress is to be accomplished. This does not, of course, mean that the tax officials can act arbitrarily or according to their whims and fancies, despite appellants' remark to the contrary (Appellants' Brief, 51). The tax authorities must follow the definite standard that Congress intended, namely that Guam taxpayers shall pay

to the Government of Guam the same tax that United States taxpayers pay to the United States.

Even assuming Section 31 of the Organic Act entails a delegation of legislative power by Congress, such delegation would not be invalid since it is given to the executive branch of a possession of the United States.

In setting up governments for the possessions of the United States, Congress is not restricted to any specific form of government and is not necessarily obliged to follow the three-fold division of powers. Congress has plenary powers in governing possessions. *First National Bank v. Yankton,* supra. If it desires, it may establish a local government with a local legislature and give such legislature local legislative authority, but Congress is not obliged to do so and if it desires, Congress may give legislative authority to some other branch of the local government.

Thus for many years the Territory of Alaska had no legislature. Guam itself, before the Organic Act, was under the Department of the Navy. The Naval Governor had plenary powers—legislative and judicial as well as executive.

In establishing the territory of Oklahoma, Congress expressly vested legislative power in the Governor as well as in the legislature. Act of May 2, 1890, c. 182, Sec. 4, 26 Stat. 81, 83.

At times Congress has also vested legislative powers in the judiciary, as in the District of Columbia and Territory of Alaska:

Keller v. Potomac Electric Power Co., (1923) 261 U.S. 428, 442, 43 S. Ct. 445, 448, 67 L. Ed. 731;

In re Annexation of Slaterville, (DC Alaska 1949) 83 F. Supp. 661, 665.

It is submitted that if Section 31 of the Organic Act involves any delegation of legislative power by Congress to the executive branch of the Government of Guam, it is constitutional.

C. Appellants' Contentions that the Separate Territorial Income Tax is Unconstitutional for Being "Indefinite and Uncertain" and "Vague and Ambiguous" Present no Justiciable Questions.

Appellants say the interpretation of Section 31, as creating a separate tax is indefinite, uncertain, vague and ambiguous. It is said the sections of the Internal Revenue Code are not specifically set forth (Complaint, Item 10, R. 9; Appellants' Brief, 58).

No allegations are made, however, which indicate where and how this asserted vagueness, if such there is, has resulted in harm to these appellants.

Certainly the term "income tax laws in force in the United States" is sufficiently definite to indicate that a taxpayer subject to the Guam income tax is to pay the same tax on Guam income as a taxpayer subject to the United States would pay on United States income.

Appellants do not point to any uncertainty in any specific section affecting the assessment of the tax upon them. They allege no facts indicating it is impossible under the law to determine their net taxable income or

to compute the tax on such income. How then can they raise any constitutional question from the facts alleged that the separate territorial income fails for being indefinite, uncertain, vague and ambiguous?

D. Failure of Appellants to Comply with Rule 35 of this Court.

Although appellants have challenged the constitutionality of Section 31 of the Organic Act, as interpreted in the Laguana decision, it is pointed out that they have failed to comply with Rule 35 of this Court:

> "Notice to Court and to Attorney General.
>
> It shall be the duty of counsel who challenges the constitutionality of any Act of Congress affecting the public interest in any suit or proceeding in this court to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, upon the filing of the record to give immediate notice in writing to this court of the existence of said question, specifying the section of the statute to be construed. In all such cases the clerk of this court shall certify such fact to the Attorney General. (See 28 U.S.C. Sec. 2403.)"

IV.

SINCE SECTION 31 OF THE ORGANIC ACT CREATES A SEPARATE TERRITORIAL INCOME TAX, THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' COMPLAINT ASKING FOR AN INJUNCTION AGAINST ENFORCEMENT OF THE TAX BY VIRTUE OF SECTION 7421, INTERNAL REVENUE CODE OF 1954.

The District Court dismissed the complaint, on appellees' motion, on the ground it had no jurisdiction un-

der Section 7421(a) of the Internal Revenue Code. It is submitted this ruling was correct.

A. The Term "Income Tax Laws" Includes Section 7421(a).

The separate territorial income tax created by Section 31 of the Organic Act consists of the "income-tax laws in force in the United States of America and those which may hereafter be enacted."

Section 7421(a)[5], Internal Revenue Code of 1954, 26 U.S.C., Section 7421(a), provides:

> "(a) Tax. Except as provided in sections 6212 (a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Appellants contend (Appellants' Brief, 30, 37) that this section has no application, apparently on the erroneous ground that Section 31 does not create a separate tax and therefore Section 7421(a) applies only to United States taxes (Appellants' Brief, 37). It is further indicated (Appellants' Brief, 30) that 28 U.S.C., Section 1341, apparently applies to Guam but it is claimed that appellants are within the exception therein provided.

However, if Section 7421(a) is a part of the "income-tax laws" referred to in Section 31 of the Organic Act, it precludes appellants' suit for injunction—barring unusual circumstances as will be discussed subsequent-

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[5]Section 7421(a) of the Internal Revenue Code of 1954, effective August 16, 1954, is successor to Section 3653(a) of the Internal Revenue Code of 1939. Appellants refer to latter in their brief (Appellants' Brief, 37, 38).

ly. Any question as to Section 1341 of Title 28 is then not in issue.

The term "income-tax laws" necessarily cannot be limited to the provisions pertaining to tax rates, exemptions, and deductions, but must be taken to include the various enforcement provisions. Without enforcement provisions the tax would be a hollow shell without substance.

This principle is implied in the *Laguana* decision when it states that the separate territorial income tax created by Section 31 is "to be collected by the proper officials of the Government of Guam."

In *Wilson v. Kennedy,* supra, (DC Guam, 1954) 123 F. Supp. 156, appeal pending in this Court, No. 14593, the District Court in granting a summary judgment in favor of the defendants, officials of the government of Guam, held specifically that Section 31 extended to them the enforcement powers under the United States Internal Revenue Code. It is stated in the Court's opinion, at page 158:

> "The defendants are sued as individuals, but they are the former Commissioner of Revenue and Taxation for Guam, and the present Governor, Attorney General, and Director of Finance for Guam, respectively. In their official capacities they are charged with responsibility for tax collection, but there is no specific statute enacted by the Guam Legislature or by the United States Congress which authorizes them to levy and collect income taxes. Such authority, if it exists, must flow by necessary implication from the law creating the tax and the logical assumption that the United States Congress

intended that the tax should be collected and used for the benefit of the Government of Guam. The pertinent provisions are Sections 30 and 31 of the Organic Act of Guam."

The District Court then concludes, at pages 159 and 160:

"The following principles appear to be basic:

1. Section 31 of the Organic Act of Guam imposes a territorial income tax to be paid to and collected by the proper officials of the Government of Guam.

2. The Director of Finance is authorized as the tax collector in Guam to enforce and receive such taxes by himself or his appointees.

* * *

4. The applicable provisions in the United States Revenue Code to enforce the payment of the territorial income tax are 'income tax laws' within the meaning of Section 31 and are available to the Director of Finance or those authorized by him, subject to those non-substantive changes in nomenclature as are necessary to avoid confusion as to the taxing jurisdiction involved."

In *Holbrook v. Taitano,* supra, (DC Guam, 1954) 125 F. Supp. 14, the plaintiff sought to enjoin the defendants, tax officials of the Government of Guam, from enforcing the tax against him, the basic claim again being that Section 31 did not create a separate territorial tax. In dismissing the complaint for lack of jurisdiction, the court held that the ban on suits to enjoin collection of taxes, contained in the United States Internal Revenue Code applied, saying, at page 17:

> "We are dealing with a tax imposed by the United States Congress and the District Court of Guam is created by that Congress. Both Section 7421 of the 1954 Internal Revenue Code, 26 U.S.C.A., and Section 3653 of Title 26 of the 1939 Code, with certain exceptions, prohibit any court from maintaining a suit for the purpose of restraining the assessment or collection of any tax."

A notice of appeal was filed in the *Holbrook* case but was subsequently dismissed by the appellant before the record reached this court.

The creation of a separate territorial income tax for Guam by the enactment by Congress of Section 31 is an example of legislation incorporating existing laws by reference which Congress has resorted to on other occasions, as mentioned in Part I hereof, pages 28-29.

The rule for interpretation of statutes enacted by reference is set forth in *Engel v. Davenport,* (1926) 271 U.S. 33, 46 S. Ct. 410, 70 L. Ed. 813:

> "The adoption of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated at full length. Kendall v. United States, 12 Pet. 524, 625, 9 L. Ed. 1181; In re Heath, 12 S. Ct. 615, 144 U.S. 92, 94, 36 L. Ed. 358; Interstate Railway v. Massachusetts, 28 S. Ct. 26, 207 U.S. 79, 85, 52 L. Ed. 111, 12 Ann. Cas. 355. *It brings into the later act 'all that is fairly covered by the reference.'* Panama Railroad Case, 44 S. Ct. 391, 264 U. S. 392; *that is to say, all the provisions of the former act which, from the nature of the subject-matter, are applicable to the later act."* (Emphasis added)

Appellants assert that 28 U.S.C., Section 1341, is applicable rather than Section 7421(a) of the Internal Revenue Code. However, if Section 1341 applies at all it is merely cumulative to Section 7421(a) in view of the fact that Section 7421(a) is a part of the "income tax laws" of the United States referred to in Section 31.

Section 1341 clearly applies to state-enacted taxes. It is scarcely appropriate to a tax enacted by Congress for a territory, such as the Guam territorial income tax.

From the foregoing it is submitted that Section 7421(a) of the Internal Revenue Code of 1954, 26 U.S.C.A., Section 7421(a) is included in the term "income tax laws," referred to in Section 31 of the Organic Act and the District Court consequently had no jurisdiction to entertain appellants' suit for injunction.

B. Circumstances in Present Case do not Warrant Invocation of Equity to Grant Appellants' Request for Injunctive Relief.

It has been held that Section 7421(a), Internal Revenue Code, does not deprive a court of its equity jurisdiction to enjoin where there are exceptional circumstances.

Hill v. Wallace, (1952) 259 U.S. 44, 42 S.Ct. 453, 66 L. Ed. 822;

Miller v. Standard Nut Margarine Co. of Florida, (1932) 284 U.S. 498, 52 S.Ct. 260, 76 L. Ed. 422.

The District Court recognized this principle in reaching its decision:

> "Now certainly if you are being discriminated against, or if the collector is attempting to ruin you financially and you have done everything to pro-

> tect yourself, you are entitled to the intervention of the Court . . . " (R. 30)

The District Court held, however, both with regard to appellants' motion for preliminary injunction (R. 26-27) and on appellees' motion to dismiss (R. 31), that on the same basis as in the *Holbrook* case relief would be denied in the absence of any showing that appellants themselves had conformed with the income tax law:

> "Now nowhere in all of this litigation except the Laguana case do the plaintiffs come into court and say, 'We have done everything administratively that we are required to do and yet we are being oppressed by the tax officials of the Government of Guam.' In every instance they say, 'We defy those officials and we defy that government and we contend that we are not responsible to that government to assist in its support as indicated and required by the United States Congress.' Certainly, as the Court pointed out in the Holbrook case and other cases, its assistance is not available to plaintiffs who insist upon the maintenance of that position. The assistance of the Court is available always if there is an abuse of discretion on the part of the collector, if oppression is such that the individual has no place else to turn, but in the present motion for temporary injunction the affidavits are completely insufficient to justify the intervention of the Court because the affiants do not show that they have performed the necessary administrative action to entitle them to show further that the collector and other government officials are acting arbitrarily. Until that foundation is laid and until the plaintiffs comply with the law, file their returns, make their payments and then object to any abuses,

the Court is definitely of the view that it has no right to intervene. The motion for temporary injunction is therefore denied." (R. 26-27)

"The law doesn't say that, so the Court will make the same ruling in this case as it did in the Holbrook case. With the absence of any showing that the plaintiff has complied with the local income tax law by filing returns and paying his tax, the Court is without jurisdiction and the case is dismissed." R. 31)

The pertinent statements in *Holbrook v. Taitano,* supra, to which the court has referred, are indicated at 125 F. Supp. at page 17:

"If, as this court held in Wilson v. Kennedy, the applicable provisions of the United States Revenue Code to enforce the payment of the territorial income tax are available to these defendants, the question necessarily arises as to whether this court has any jurisdiction under the allegations of the complaint. It is not contended by the plaintiff that these defendants have done or are doing anything not authorized by the Internal Revenue Code of the United States, nor is it questioned that they rely upon such Code for their authority to enforce the income tax created by Section 31 of the Organic Act of Guam rather than upon any legislation adopted by the Guam Legislature. This is not the type of case considered by the court in Sanders v. Andrews, D.C., 121 F. Supp. 584, where the court enjoined the enforcement of jeopardy assessments because such assessments were arbitrary and capricious under the circumstances of that case. *There the court held that the taxpayer had done everything he could reasonably be expected to do to fulfill his*

tax obligation. In the instant case the taxpayer plaintiff has failed or refused to recognize any authority on the part of the Government of Guam to collect the tax imposed by Section 31.

"We are dealing with a tax imposed by the United States Congress and the District Court of Guam is a court created by that Congress. Both Section 7421 of the 1954 Internal Revenue Code, 26 U.S.C.A., and Section 3653 of Title 26 of the 1939 Code, with certain exceptions, prohibit any court from maintaining a suit for the purpose of restraining the assessment or collection of any tax. The aggrieved taxpayer is left to his administrative remedies unless equity requires court intervention to prevent arbitrary and capricious action. The Government of Guam must obtain revenue to operate. In establishing it, the United States Congress in the Organic Act of Guam provided how that revenue, in part, should be obtained. This court has no no jurisdiction to intervene when the taxpayer plaintiff is in open defiance of the Government of Guam as regards its authority to require him to pay income taxes on income earned in Guam." (Emphasis added)

The primary purpose of Section 7421(a) and its predecessors has long been recognized as being to prohibit suits which will interfere with the assessment and collection of tax revenue necessary to the maintenance of government:

State Railroad Tax Cases, (1876) 92 U.S. 575, 613, 23 L. Ed. 663, 673;

Cadwalader v. Sturgess, (CA 3, 1924) 297 F. 73, 75;

Voss v. Hinds, (DC WD Okla, 1953) 111 F. Supp. 679, 681.

The courts have held that Section 7421(a), or its predecessors, applies even where the assessment is alleged to be illegal and even where the tax statute itself is alleged to be unconstitutional:

Dodge v. Osborn, (1916) 240 U.S. 118, 36 S.Ct. 275, 60 L. Ed 557;

Bailey v. George, (1922) 259 U.S. 16, 42 S.Ct. 419, 66 L. Ed. 816;

Graham v. DuPont, (1923) 262 U.S. 234, 43 S.Ct. 567, 67 L. Ed. 965;

Harvey v. Early, (CA 4, 1947) 160 F. 2d 836;

Dyer v. Gallagher, (CA 6, 1953) 203 F. 2d 477;

Robique v. Lambert, (DC ED La., 1953) 114 F. Supp. 305, affirmed (CA 5, 1954) 214 F. 2d 3.

A study of these cases indicates that the situation must be truly extraordinary before the "exceptional circumstance" doctrine will apply.

In *Bailey v. George,* supra, (1922) 259 U.S. 16, 36 S.Ct. 419, 66 L. Ed. 816, the district court had enjoined the enforcement of the Child Labor Tax Law, a federal tax statute. In reversing, the Supreme Court held:

> "An examination of the bill shows no other ground for equitable relief than as stated in the order. The bill does aver 'that these your petitioners have exhausted all legal remedies and it is necessary for them to be given equitable relief in the premises;' but there are not specific facts set forth sustaining this mere legal conclusion. Section 3224, R. S. (Comp. St. 5947), provides that 'no suit for the purpose of restraining the assessment or col-

lection of any tax shall be maintained in any court.' The averment that a taxing statute is unconstitutional does not take this case out of the section. There must be some extraordinary and exceptional circumstance not here averred or shown to make the provisions of the section inapplicable."

In *Dyer v. Gallagher,* supra, (CA 6, 1953), 203 F. 2d 477, another action to restrain which was dismissed on motion under Section 3653 of the Internal Revenue Code of 1939, it was alleged:

"The complaint alleges that a jeopardy assessment of income tax deficiencies for the years in question had been made against her and her husband in the amount of $84,065.55 which had been listed to the Collector for collection; that she is unable to furnish the required bond to stay collection; that the Collector will seize and sell her property without notice or demand; that the collection will cause her irreparable injury; that she has no remedy at law; that the jeopardy assessment 'is a void and arbitrary action, made without warrant or authority of law, in violation of plaintiff's constitutional rights and privileges to due process of law, and was a mistake and error of law, and is not supported or sustainable by any substantial, credible, competent, relevant or material evidence;' and that the appellee is exceeding his authority in proceeding to collect the assessment by seizure and sale."

The court held:

"In any event the alleged unconstitutionality of the taxing statute is not sufficient grounds to justify injunctive relief. Dodge v. Osborn, 240 U.S. 118, 36 S.Ct. 275, 60 L. Ed. 557; Bailey v. George, 259 U.S.

16, 42 S.Ct. 419, 66 L. Ed. 816. It is also well settled that injunctive relief will not be granted on the ground, without more, that the tax has been erroneously or illegally assessed. Snyder v. Marks, 3 S.Ct. 157, 27 L. Ed. 901, 109 U.S. 189; Graham v. DuPont, 262 U.S. 234, 43 S.Ct. 567, 67 L. Ed. 965; Reams v. Vrooman-Fehn Printing Co., 6 Cir., 140 F. 2d 237, 240. In our opinion, the extraordinary and exceptional circumstances justifying injunctive relief are not shown to exist by the complaint in this action. See Reams v. Vrooman-Fehn Printing Co., supra; Ohio State Nurses' Ass'n v. Busey, 6 Cir., 120 F. 2d 11, the first of which cases points out the exceptional circumstances which authorized injunctive relief in Midwest Haulers v. Brady, supra, and John M. Hirst & Co. v. Gentsch, supra, which are not present in a case like the present one. In addition, it was pointed out in both of those cases that the complaint showed that the tax which the Collector was seeking to enforce was probably not validly assessed and was not legally due. The complaint in the present case alleges no facts which sustain the contention that the jeopardy assessment was arbitrary, without authority, unsupported by competent evidence, and a mistake and error of law. It states that the assessment is illegal, without disclosing in any way the facts on which the assessment was based or in what way and why the ruling of the Commissioner was erroneous. Such allegations in the petition are mere conclusions and are not sufficient to state a cause of action on that ground. Straus v. Foxworth, 231 U.S. 162, 168, 34 S.Ct. 42, 58 L. Ed. 168; Pacific States Box & Basket Co. v. White, 296 U.S. 176, 184-185, 56 S.Ct. 159, 80 L. Ed. 138; Sheridan-Wyoming Coal Co. v. Krug, 83 U.S. App. D.C. 162, 168 F. 2d 557, 558-

559; Marranzano v. Riggs National Bank, 87 U.S. App. D.C. 195, 184 F. 2d 349, 351; Billings Utility Co. v. Advisory Committee Board of Governors, 8 Cir., 135 F. 2d 108; Cohen v. Beneficial Industrial Loan Corp., D.C. N.J., 69 F. Supp. 297, 301-302."

In *Robique v. Lambert,* supra, (DC ED La. 1953), 114 F. Supp. 305, the complaint was dismissed on motion notwithstanding the complainants contended:

" . . . that the assessment of the high tax, and demand for payment thereof under threat of seizure is punitive, arbitrary, capricious and discriminatory, and in violation of the Due Process Clause of the United States Constitution, Amend. 5. They allege want of an adequate remedy at law, and irreparable injury, and pray for injunctive relief. Respondent has moved to dismiss the complaints on the ground that because of the provisions of Section 3653, Internal Revenue Code, 26 U.S.C.A., Sec. 3653, this Court is without jurisdiction. . . . Briefly, the exceptional circumstances alleged to exist here are that complainants are unable to pay the tax demanded, and that the action of respondent will give rise to a multiplicity of suits in that complainants will be required to file several suits to obtain refund of such taxes as may unlawfully be collected from them. Although complainants plead their inability to pay the tax it is plain from the pleadings that what they mean is that payment of the tax will be a hardship . . . Allegations of hardship to pay taxes are not sufficient to confer jurisdiction on this Court. State of California v. Latimer, 305 U.S. 255, 262, 59 S.Ct. 166, 83 L. Ed. 159; Reams v. Vrooman-Fehn Printing Co., 6 Cir., 140 F. 2d 237 . . . The remedy of the complainants

> is to pay the taxes, apply for refund, and if refund is denied, sue the Director to recover the taxes. Larson, Collector of Internal Revenue v. House, 5 Cir., 1940, 112 F. 2d 930."

Appellants claim the taxes assessed against them are in excess of their net worth (R. 15, 18), but as indicated in *Robique v. Lambert,* supra, allegations of hardship to pay taxes are not sufficient to confer jurisdiction. Other cases so holding:

State of California v. Latimer, (1938) 305 U.S. 255, 59 S.Ct. 166, 83 L. Ed. 159;

Reams v. Vrooman-Fehn Printing Co., (CA 6, 1944) 140 F. 2d 237;

Milliken v. Gill, (CA 4, 1954) 211 F. 2d 869.

It is a maxim of equity that he who seeks equitable relief must in turn do equity. Equitable relief by way of injunction against the enforcement of taxes has been denied in many cases where the conduct of the party seeking such equitable relief has not itself been deemed equitable by the courts.

The District Court stressed the fact that the appellants, as the plaintiff in *Holbrook v. Taitano,* supra, have been in open defiance of the Government of Guam with regard to enforcement of the territorial income tax held to have been established by Section 31 by the decision in the *Laguana* case. They themselves admit that they have failed to file income tax returns (Appellants' Brief, 39), and as indicated in the affidavit of the Appellee Mangerich, the Commissioner of Revenue and Taxation, they have denied access to their books and records and failed to honor summons issued by the

Commissioner of Revenue and Taxation to appear before him (R. 20-22-A).

Thus in *State Railroad Tax Cases,* supra, (1876) 92 U.S. 575, 616, 23 L. Ed. 663, 674, it is stated:

> "But there is another principle of equitable jurisprudence which forbids in these cases the interference of a court of chancery in favor of complainants. It is that universal rule which requires that he who seeks equity at the hands of the court must first do equity . . . Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them. It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill, that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted."

German National Bank of Chicago v. Kimball, (1881) 103 U.S. 732, 733, 26 L. Ed. 469:

> "The allegations are pretty full that the assessments are partial, unequal and unjust, and do not result in the uniformity of taxation which the Constitution of Illinois requires. But we think there

are two fatal objections to the bill. The first of these is that there is no offer to pay any sum as the tax which the shares of the Bank ought to pay. We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay. That he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity."

Northern Pac. R. Co. v. Clark, (1894) 153 U.S. 252, 272, 14 S.Ct. 809, 816, 38 L. Ed. 706:

"Being liable to pay either the percentage on gross earnings in accordance with the provisions of the act of 1889, or the tax upon its lands, as other property of like character was assessed, the appellant was not entitled to any relief in a court of equity by injunction without payment or tender of what was due under one or the other of these modes of taxation.

"In State Railroad Tax Cases, 92 U.S. 575, 616, 617, the rule is established that before an injunction will be granted in such cases as the present, a party must pay or tender what can be seen to be due on the face of the bill, and, speaking for the court in that case, Mr. Justice Miller said that the duty of making such a tender or payment before any injunction will be allowed is laid down 'as a rule to govern the courts of the United States in their action in such cases.' This rule was repeated in

> Bank v. Kimball, 103 U.S. 732, 733, where it was treated as a fatal objection to the bill that there was no offer to pay any sum as a tax which the party ought to pay, and, again speaking for this court, Mr. Justice Miller there said: 'We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay,' etc."

It is submitted that in appellants' case there are no special circumstances to justify the granting of an injunction.

C. Appellants Have Adequate Procedures Available to Them and Have not Exhausted Their Administrative Remedies.

If there were no methods available to appellants to litigate the question as to whether Section 31 of the Organic Act creates a separate territorial income tax, and also whether such tax has been properly enforced with regard to their own income, the situation might well be within the exceptional circumstances under which a court of equity will take jurisdiction notwithstanding Section 7421(a) of the Internal Revenue Code.

Appellants, however, have not followed the administrative possibilities open to them, within the tax law, and instead say that such tax law, though recognized by the *Laguana* decision, has no valid existence.

With regard to any claim for refund due appellants for any tax improperly collected from them, as shown

in Part V hereof, infra, pages 61-63, appellants have failed to file a claim as required by Section 7422(a) of the Internal Revenue Code.

If such a claim were filed, a suit for refund could then be instituted against the Commissioner of Revenue and Taxation, or, it may be possible, against the Government of Guam itself. It may be that just as a suit for refund of the United States income tax can be maintained against the United States under 28 U.S.C., Section 1346, so, also, such a suit may be maintained against the Government of Guam by inference on the theory that such waiver of immunity for the territory is necessarily included by the enactment of Section 31 of the Organic Act.

By creating the separate territorial income tax, Congress necessarily intended to give the taxpayer similar rights as a United States taxpayer under the United States income tax, which would include a right to sue for refund.[6]

The most glaring omission on appellants' part to resort to administrative procedures is their failure to file income tax returns. How then can they complain against the correctness of the amount of the Tax Commisioner's assessment when they refuse to furnish the correct information by filing returns?

The same may be said with regard to their failure to honor the Commissioner's summons to produce their books and records.

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[6]This is not contrary to *Crain v. Government of Guam,* (DC Guam, 1951) 97 F. Supp. 433, affirmed by this Court, (1952) 195 F. 2d 414, which was an action for a declaratory judgment.

Certainly it was to cover such circumstances that Section 7421(a) and its predecessors were enacted, and also, as mentioned supra, page 52-55, courts have denied equitable relief where the complaining party has not himself done equity.

Appellants mention the lack of a "tax court" (Appellants' Brief, 51). It must be conceded that the Government of Guam has not expressly established a Guam Tax Court, if that is what appellants refer to.

It is possible, however, that the United States Tax Court would have jurisdiction to hear an appeal from a determination by the Commissioner as to tax liability.

So also the District Court of Guam, in its capacity as the court of general jurisdiction over all local cases, may well have jurisdiction under the circumstances. Section 22(a), Organic Act of Guam; 48 U.S.C., Section 1424.[7]

A review of a proposed tax assessment prior to liability to pay the tax is not, however, as a general principle a requirement for due process. The tax statutes are legion in various jurisdictions where the only remedy a complaining taxpayer has is to pay the assessment made administratively and then file suit for refund.

This was true with regard to the United States income tax until the United States Tax Court, or Board of Tax Appeals as it was then called, was established in 1924.

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[7]". . . The District Court of Guam shall have in all causes arising under the laws of the United States, the jurisdiction of a district court of the United States as such court is defined in Section 451 of Title 28, United States Code, and shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, . . ."

Even now not all federal taxes may be appealed to the Tax Court. Its jurisdiction is limited principally to income, estate and gift taxes. For many federal taxes the taxpayer's only remedy is to pay and sue for refund, as shown, for example, in *Robique v. Lambert,* supra.

Even if the Government of Guam has been remiss in not establishing a tax court comparable to the United States Tax Court, that would not, of course, mean that the *Laguana* decision should be overruled and appellants' theory of Section 31 be adopted.

There would still be a separate territorial income tax. At the very most the assessments against appellants would be questionable as such but appellant would still be liable for the tax actually owed by them. They would not be entitled to an injunction as long as they themselves refused to obey the tax law. They would not be entitled to sue for a refund for the tax collected from them without filing a proper claim.

D. Appellants' Motion for Temporary Injunction was Properly Denied and Appellees' Motion to Dismiss was Properly Granted Even Though the Facts Well Pleaded Were Admitted for the Sake of the Motion; Answers to Miscellaneous Points.

Appellants contend it was error to deny their motion for a temporary injunction and grant appellees' motion to dismiss in that it denied appellants their day in court and disregarded the fundamental rule that upon a motion to dismiss all allegations of the complaint stand admitted (Appellants' Brief, 35-41, 43-46, 56).

But as pointed out previously, the underlying basic point is whether Section 31 creates a separate territorial

tax. This is a *question of law* and could be, and properly was, decided on the motion to dismiss.

Were the appellees, as tax officials of the Government of Guam, authorized to collect that tax? Granting there is a separate tax, it is again a question of law as to the authority of the Governor of Guam, and the appellees as his subordinates, to enforce the tax.

These questions of law have already been fully discussed, supra, in Part I, pages 19-29 and Part II, pages 30-34.

As shown in this Part IV, the District Court had no jurisdiction to enjoin enforcement of the tax by virtue of Section 7421(a) of the Internal Revenue Code. The temporary injunction was thus properly denied, and appellees' motion to dismiss was properly granted.

Many of the statements of the complaint actually are no more than appellants' interpretation of the statutes involved and are mere conclusions of law.

As to the facts alleged, these constitute acts performed by appellees in enforcing the separate tax. These acts are certainly conceded. But again, to the extent the complaint alleges that these acts are violations of the Constitution, Organic Act, and various statutes, the allegations are mere conclusions of law.

With regard to their own motion for a temporary injunction, appellants argue:

> "As upon a motion to dismiss, it is presumed that likewise the uncontroverted allegations of fact contained in the complaint and supported by the affidavits of both appellants must and should be for

> the purposes of the motion be taken as true." (Appellants' Brief, 42.)

In other words, appellants present the rather startling doctrine that when a plaintiff files a motion, the allegations in his own complaint must be taken as true!

No authorities are cited.

It is submitted that the granting of a temporary injunction lies within the sound discretion of the court.

It is submitted the court properly denied the temporary injunction. The same reasons for the granting of appellees' motion to dismiss also sustain the denial of the temporary injunction.

Appellants, however, say (Appellants' Brief, 42-43) that at the hearing on the temporary injunction on November 12, 1954, the court

> "was obviously aware of the contents of this (appellees') motion to dismiss as he commented upon the contents and supporting affidavit familiarly, although he obviously had no opportunity to review either the motion or the affidavit after it was filed and before the hearing on that morning."

This would appear to be an innuendo, at the very least, that counsel for appellees had informed the court privately of the context of the proposed motion or had furnished the court a copy before it was filed.

However, appellants' charges are unwarranted. A reading of the record of the hearing (R. 25-28) clearly shows the court's ruling was based on appellants' failure to allege compliance with the separate income tax law and their challenge to the existence of such a law.

Moreover, it is not improbable that appellees' motion and supporting affidavit, filed earlier that morning, had already been placed in the case file by the clerk and had been read by the court.

Appellants also argue that appellants' motion to dismiss was granted on hearsay and private knowledge (Appellants' Brief, 46) and add:

> "This is amply borne out by the failure of counsel for appellees to argue their motion and the extensive argument appearing in the record in behalf of appellees made by the court."

As to failure of appellees' counsel to argue, it may be stated that counsel had some days previously filed a seven-page memorandum of authorities. (This is not included in the record.) The court was thus fully aware of appellees' position.

V.

SINCE SECTION 31 OF THE ORGANIC ACT CREATES A SEPARATE TERRITORIAL INCOME TAX, THE DISTRICT COURT ALSO HAD NO JURISDICTION INSOFAR AS THE APPELLANTS SEEK A REFUND OF TAXES COLLECTED, BY VIRTUE OF APPELLANTS' FAILURE TO FILE A CLAIM AS REQUIRED BY SECTION 7422(a) INTERNAL REVENUE CODE OF 1954.

In addition to not having jurisdiction over the subject matter of the action under Section 7421(a) to grant an injunction against the enforcement of the tax, insofar as the appellants seek in their complaint a refund for the taxes collected from them, the court also did not have jurisdiction.

Section 7422(a), Internal Revenue Code of 1954, provides:

> "(a) No Suit Prior to Filing Claim for Refund. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

This section for the same reasons as shown in Part IV hereof with regard to Section 7421(a) must be regarded as part of the "income tax laws" which constitute the separate Guam territorial income tax created under Section 31 of the Organic Act. Section 7422(a) merely provides the orderly administrative procedure which is a necessary condition precedent to the filing of a suit for refund of the tax. The predecessor to this section, Section 3772(a) of the Internal Revenue Code of 1939 was properly complied with by the plaintiff Laguana in *Laguana v. Ansell,* 102 F. Supp. at 920.

The appellants in the present case, however, have failed to allege compliance with the conditions required by the statute. In fact, they have not filed any such claim for refund, as indicated in paragraph 9 of the affidavit of Appellee Mangerich (R. 22-23).

This failure to file a claim for refund before instituting a suit for refund is jurisdictional. An action will not lie in the absence of filing a claim for refund:

Rock Island, A. & L. R. Co. v. United States, (1920) 254 U.S. 141, 41 S.Ct. 55, 65 L. Ed. 188;
United States v. Felt & Tarrant Mfg. Co., (1931) 283 U.S. 269, 51 S.Ct. 376, 75 L. Ed. 1025;
R. J. Reynolds Tobacco Co. v. Robertson, (CA 4, 1936) 80 F. 2d 966;
Kales v. United States (CA 3, 1940) 115 F. 2d 497, affirmed (1941) 314 U.S. 186, 62 S.Ct. 214, 86 L. Ed. 132;
Harvey v. Early, (CA 4, 1947), 160 F. 2d 836.

VI.

THE DISTRICT COURT CONTINUED TO HAVE JURISDICTION TO HEAR AND GRANT APPELLEES' MOTION AFTER APPELLANTS FILED NOTICE OF APPEAL FOLLOWING DENIAL OF PRELIMINARY INJUNCTION.

Appellants contend that their appeal from the denial by the District Court of their motion for temporary injunction removed the entire case from the District Court. Consequently, they argue, the District Court could not entertain the motion of the appellees to dismiss the complaint (Appellants' Brief, 30, 39-40, 43). No authorities are cited.

It is true, of course, that appellants had the right to appeal the interlocutory order of the court denying the temporary injunction. 28 U.S.C., Section 1292. But this did not remove the entire case to this court.

In construing an earlier version of 28 U.S.C., Section 1292, the Supreme Court said in *Ex parte National*

Enameling and Stamping Company, (1906) 201 U.S. 156, 26 S.Ct. 404, 406, 50 L. Ed. 707:

> "Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered."

Additional cases:

Cuyler v. Atlantic & N.C.R. Co., (CC ED NC, (1904) 132 F. 568;

Foot v. Parsons Non-Skid Co., (CA 6, 1912) 196 F. 951.

It is submitted that the District Court continued to have jurisdiction after notice of appeal was filed to hear and grant appellees' motion to dismiss, following denial of appellants' motion for preliminary injunction.

VII.

APPELLANT PHELAN'S SEPARATE CAUSE OF ACTION WAS PROPERLY DISMISSED BY THE DISTRICT COURT.

In the complaint (R. 11) appellant Phelan sets forth a separate cause of action in his own behalf in which he states he is a permanently disabled veteran of World War II receiving disability compensation from the United States Veterans Administration, that checks for

such compensation have been deposited in the accounts, the proceeds of which were illegally distrained upon by the appellees, and that such compensation is absolutely exempt from any levy, attachment, or distraint.

This separate cause of action is apparently added as an additional ground for entitling the appellant Phelan to a judgment for the refund prayed for.

Assuming for the sake of argument that the compensation received by the appellant is exempt as he claims, that alone would not make illegal the distraint upon the bank accounts in which the compensation checks were deposited. The mere fact that the appellant from time to time deposited individual checks of the nature described into his three accounts, would not, of course, make the entire amounts in such accounts exempt from execution. If there is any exemption at all, it would be up to the claimant at least to identify what portions of the named accounts constitute his disability compensaion. This he has failed to allege. It cannot be claimed that the entire balance necessarily represents only disability compensation and not other sources of income.

In any event, however, if there is any merit to appellant's contention that portions, or even all of the deposits in his accounts, constitute disability compensation payments, it was incumbent upon him, following the distraint, to file a proper claim with the Commissioner of Revenue and Taxation for a refund in accordance with Section 7422(a), Internal Revenue Code of 1954, prior to instituting suit, as previously discussed in Part V hereof.

It is questionable, however, whether as a matter of law Appellant Phelan's disability compensation payments are exempt from execution levied in the payment of his income tax liability.

He cites 38 U.S.C.A., Section 454a, as authority for the claimed exemption. However, this entire chapter, Chapter 10, refers only to veterans of World War I, as indicated in Section 424. Appellant has not cited by what authority the exemption section was extended to veterans of World War II.

In addition the exemption in Section 690, subparagraph 13, Guam Code of Civil Procedure, which is also quoted by the appellant, exempts "money" received as "a pension from the United States Government." Appellant cites no authority to sustain his contention that his "disability compensation" comes under the term "pension from the United States Government."

In any event, however, the provisions cited by the appellant are necessarily superseded by the limitations contained in Section 6334 of the Internal Revenue Code of 1954, which applies to Guam as part of the separate income tax law enacted by Section 31 of the Organic Act. Section 6334 reads as follows:

"Sec. 6334. Property Exempt From Levy.

(a) Enumeration.—There shall be exempt from levy—

(1) Wearing Apparel and School Books.—Such items of wearing apparel and such school books as are necessary for taxpayer or for members of his family;

(2) Fuel, Provisions, Furniture, and Personal Effects.—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value;

(3) Books and Tools of a Trade, Business, or Profession.—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value.

(b) Appraisal.—The officer seizing property of the type described in subsection (a) shall appraise and set aside to the owner the amount of such property declared to be exempt. If the taxpayer objects at the time of the seizure to the valuation fixed by the officer making the seizure, the Secretary or his delegate shall summon three disinterested individuals who shall make the valuation.

(c) No Other Property Exempt. — Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a)."

It is submitted that the express provisions of Section 6334(c) bar any exemptions as far as payment of the income tax is concerned other than those set forth in Section 6334(a).

Not only does this section supersede any exemption claimed under Section 454(a) of Title 38 U.S.C., but it also supersedes any exemption claimed under any law enacted by the Legislature of Guam. By the enact-

ment of Section 31 of the Organic Act, establishing a separate territorial income tax for Guam, the United States Congress by including therein the exemption provisions of the Internal Revenue Code as a part of the income tax law of Guam necessarily provided the exemption provisions which must be followed. Any contrary exemption under a locally enacted law of Guam, then in effect or thereafter enacted by the Guam Legislature, would have no application.

It is submitted that Appellant Phelan's separate cause of action did not state a claim upon which relief could be granted.

VIII.

THERE WAS NO ERROR IN PERMITTING MEMBERS OF THE ATTORNEY GENERAL'S STAFF TO REPRESENT APPELLEES IN THE DISTRICT COURT.

In Part VI of their brief (Appellants' Brief, 52-53) appellants ask a reversal on the ground that the District Court permitted "laymen," namely, "two employees of the Attorney General of Guam," to appear and represent the appellees.

The persons referred to are, respectively, the Deputy Attorney General and Deputy Island Attorney. (R. 24.)

The appellees have been sued as individuals, but for acts done in their official capacities and under color of

office, as respectively, the Director of Finance and his subordinate, the Commissioner of Revenue and Taxation.

Under Sections 5101, 7000 and 7001, Government Code of Guam, the Department of Law, under the direction of the Attorney General "shall have cognizance of all legal matters in which the government of Guam is in anywise interested."

In addition Section 7101, Government Code of Guam, provides that the Island Attorney, or his deputy shall " . . . conduct on behalf of the Government of Guam all civil actions in which the government is a party or interested."

Section 7, Government Code of Guam, authorizes a deputy of any public officer to perform any duty imposed upon such public officer.

Surely the Government of Guam is interested in this pending litigation involving such an important question as the legality of the territorial income tax. Consequently, in appearing as counsel for the appellees, members of the Attorney General's staff are not engaged in private practice but are defending the interests of the Government of Guam.

It is a matter of common knowledge that litigation against individual United States collectors or directors of internal revenue are defended by United States government counsel.

CONCLUSION.

It is submitted that the District Court of Guam properly denied appellants' motion for temporary injunction and thereafter properly granted appellees' motion to dismiss the complaint for lack of jurisdiction. Consequently, appellants' combined appeal is without merit and the decision of the District Court should be affirmed.

Dated, Agana, Guam,
July 18, 1955.

Respectfully submitted,

HOWARD D. PORTER,
Attorney General of Guam,
LOUIS A. OTTO, JR.,
Deputy Attorney General of Guam,
LEON D. FLORES,
Island Attorney of Guam,
RICHARD ROSENBERRY,
Deputy Island Attorney of Guam,
Attorneys for Appellees.

(Appendix Follows.)

Appendix.

Appendix

Government of
The Virgin Islands of the United States

Charlotte Amalie, St. Thomas

November 16, 1954

Honorable William C. Strand
Director, Office of Territories
Department of the Interior
Washington 25, D. C.

My dear Director Strand:

This is in response to your letter of November 9, 1954, requesting certain information regarding the enforcement of the Income Tax Laws in the Virgin Islands.

In enforcing the Income Tax Laws in the Virgin Islands, we have never had to apply the criminal provisions of the Internal Revenue Code. If such action becomes necessary, our proceedings will be based on the Federal law, since we do not have any territorial laws implementing the Federal laws.

Sincerely,

A. A. Alexander
Governor

United States Department of Justice

United States Attorney
Virgin Islands of the United States
Charlotte Amalie, V. I.

June 3, 1954

Honorable Louis A. Otto, Jr.
Acting Attorney General
Government of Guam
Agana, Guam

My dear Mr. Otto:

This is in reply to your letter of May 24, 1954, requesting information covering the collection of income tax in this jurisdiction under Section 1397, Title 48 U.S.C.A.

Ever since the income tax laws of the United States became applicable to the Virginia Islands they have been enforced under the provisions of the United States Internal Revenue Code. The Commissioner of Finance was designated the Collector of Internal Revenue by the Governor of the Virgin Island and an office set up administratively to administer and collect the tax. No local legislation has been passed to implement in any way the procedure in the collection of the tax, criminal or civil. The only thing which is done locally is to set up in the annual budget a certain amount for the purpose of refunding overpayment of taxes.

It is my opinion that it would be advisable for you to operate solely under the income tax laws of the United States than to supplement them by any local law. I do not think any such law will improve on the Federal law and whatever is necessary to be done with respect to the establishment of an office to collect and administer the tax may be done administratively.

Hoping this information will be of service to you and with kindest regards, I am

Sincerely yours,
/s/ Cyril Michael
Cyril Michael
United States Attorney